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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL BUSTAMANTE, Defendant and Appellant.	B230898 (Los Angeles County Super. Ct. No. VA116677)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter Espinoza, Judge. Affirmed.

Roland G. Ruvalcaba, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General of California, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stacy S. Schwartz and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Miguel Angel Bustamante appeals from the judgment upon his conviction on three counts of making criminal threats pursuant to Penal Code section 422. Appellant asserts there was insufficient evidence to support the jury's findings and the trial court abused its discretion in admitting evidence under Evidence Code section 1109. Appellant's claims lack merit, and accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Beatriz Amaya ("Amaya"), appellant's wife, was the victim of appellant's criminal threats. Fearing for her life, Amaya sent a letter to the police documenting three incidents in which appellant threatened to kill her. Upon receiving Amaya's letter, the police decided to investigate by visiting Amaya and appellant at their home. Subsequently, appellant was arrested and charged with three felony counts of resisting an executive officer under Penal Code section 69 (counts 1, 2, and 3),[1] one misdemeanor count of brandishing a deadly weapon under Penal Code section 417, subdivision (a)(1) (count 4),[2] and three felony counts of making criminal threats under Penal Code section 422 (counts 5, 6, and 7).[3]

Appellant pleaded not guilty and denied the special allegations. Trial was by jury. The jury found appellant not guilty of counts 1, 2, and 3 but guilty as to counts 4, 5, 6, and 7. The jury further found the allegation that appellant personally used a deadly or dangerous weapon in his commission of count 5 to be true. The trial court sentenced

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[1] Counts 1, 2, and 3 relate to an incident that occurred on August 2010. In order to investigate the letter Amaya sent to the police, three Huntington Park Police Detectives approached appellant outside his home. Appellant approached the Detectives—who were wearing civilian clothes—with an ax in hand. At some point after the detectives thrice ordered appellant to drop the ax, appellant did so.

[2] This count relates to the ax in counts 1, 2, and 3.

[3] As to count 5, it was further alleged appellant personally used a deadly or dangerous weapon within the meaning of Penal Code section 12022, subdivision (b)(1).

appellant to three years and four months in state prison. The trial court entered judgment on February 7, 2011.

I. Penal Code Section 422 Conviction

A. The People's Evidence

The People's evidence was comprised solely of Amaya's testimony concerning the events that follow.

1. September 2008 (Uncharged Incident of Domestic Violence)

In or about September 2008, appellant slapped Amaya twice on her lower cheek and jaw. This caused Amaya to fall onto the bed and be in pain for approximately two days. Amaya did not report this incident to the police.

2. December 2008 (Count 7)

In late 2008, Amaya went to Utah to look for work and care for her sister who was ill. While there, Amaya had a phone conversation with appellant during which appellant urged Amaya to return to California. During one such phone conversation, appellant told Amaya that if she did not return by the end of the week, he would take all of Amaya's belongings and burn them. In order to prevent this from happening, Amaya returned to California.

When Amaya returned to California, appellant picked her up at the airport in his van. While driving home on the I-105, Amaya and appellant argued about Amaya's desire to stay in Utah to care for her sister. Appellant then stopped on the side of the freeway over a bridge or overpass and said, "Watch, I am going to throw you over this bridge." Appellant then got out of the van and walked around to the front passenger door where Amaya was sitting. Amaya testified that she locked the doors to keep appellant from entering the van. Appellant continued to yell at Amaya for approximately 30 minutes during which time Amaya was afraid appellant would carry out his threat. Once appellant calmed down, Amaya unlocked the doors.

3. April 2010 (Count 6)

In or about April 2010, appellant and Amaya had an argument about appellant's use of Amaya's pillows. During this argument, appellant told Amaya to "be quiet . . .

[o]therwise he was going to hang [her from] the tree. . . [out] front." This caused Amaya to fear that appellant would actually hang her. Although appellant did not have rope in his hands when he made the threat, he did have access to materials (e.g. rope) that he could use to hang her.

4. August 2010 (Count 5)

In or about August 2010, appellant approached Amaya while she was working at her desk located in the garage of their home. Appellant and Amaya argued about a comment made by Amaya's daughter regarding the dog's use of the pool to bathe. Appellant was angered by Amaya's responses to the argument and while holding a Maglite flashlight, appellant told Amaya, "Well, you know I am going to beat the shit out of you."

B. Defendant's Evidence

At trial, appellant testified on his own behalf. Appellant denied stopping by a bridge or overpass while on the I-105 and threatening to throw Amaya off. Appellant denied threatening to hang Amaya from a tree. Appellant also denied threatening to "beat the shit out of [Amaya]" while holding a flashlight.

In addition, the defense introduced testimony from appellant's daughter, Samantha Bustamante. Samantha stated that in October 2008 she was awakened by a scream and the sound of something falling on the floor. Samantha stated that she entered appellant's bedroom and asked what was going on; Amaya responded that appellant had hit her on her face. However, Samantha did not see any marks on Amaya's face and was asked by Amaya not to call the police.

CONTENTIONS

Appellant contends the trial court erred in admitting evidence of an uncharged and unreported incident of domestic violence because the incident was prejudicial pursuant to Evidence Code section 352. Appellant also asserts there was insufficient evidence presented at trial to sustain his conviction for making criminal threats under Penal Code section 422. He argues the prosecution failed to present any reasonable, credible, and solid evidence which would permit a juror to find (1) that the threats were so

unequivocal, unconditional, immediate, and specific so as to convey to Amaya a "gravity of purpose and an immediate execution of the threat" and (2) that Amaya's fear was reasonable.

DISCUSSION

I. The Admission of Evidence of a Prior Uncharged Incident of Domestic Violence under Evidence Code Sections 1109 and 352

A. Background Facts

Prior to trial, the court held a hearing outside the presence of the jury concerning the admission of evidence of a prior incident of domestic violence committed by appellant against Amaya which occurred in September 2008. Appellant slapped Amaya twice on her face causing her to fall onto the bed and be in pain for two days. The prosecution sought to introduce Amaya's testimony of the incident under Evidence Code section 1109 to show propensity and Amaya's reasonable fear of appellant. The defense sought to exclude the testimony based on the fact there was no police or medical record to support the claim. The court held the incident was admissible both to show propensity as well as Amaya's reasonable fear under Penal Code section 422.

B. Relevant Legal Principles

Evidence Code section 1109 provides that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence" within the prior 10 years is admissible, unless it is deemed more prejudicial than probative pursuant to Evidence Code section 352. (Evid. Code, § 1109.) Under Evidence Code section 1109, subdivision (a)(1), both charged and uncharged acts of domestic violence are admissible to show a defendant's propensity to commit such crimes. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024.) In determining admissibility, the court is required to do a balancing test under Evidence Code section 352. In other words, the court must determine whether the probative value of the evidence "is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of

issues, or misleading the jury." (Evid. Code, § 352.) We review an Evidence Code section 352 ruling for an abuse of discretion. (*People v. Thomas* (2011) 52 Cal.4th 336, 354-355.) Thus, this court will not disturb a trial court's exercise of discretion under Evidence Code section 352 absent a showing that the trial court acted in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Moreover, the undue prejudice must substantially outweigh its relevance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

C. The Court Did Not Abuse Its Discretion in Admitting Evidence of the Uncharged and Unreported Prior Incident of Domestic Violence

Appellant proposes that under *Ewoldt*, evidence of a prior uncharged incident will be admitted and strongly probative when the incident is both similar to, and wholly independent of, the charged crime. However, the analysis set forth in *Ewoldt* does not apply or control here. *Ewoldt* addressed a matter of admission of evidence under Evidence Code section 1101 where the uncharged conduct was introduced to show common design or plan. While in the instant case, the court explicitly noted that the evidence was relevant under Evidence Code section 1109 as propensity evidence and relevant to show Amaya's reasonable fear of the defendant on the charges of making criminal threats under Penal Code section 422.

In *People v. Ogle*, the defendant was convicted of, among other things, making criminal threats. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1145.) On appeal, the defendant challenged the admission of evidence of past uncharged acts of domestic violence. (*Ibid*.) The defendant argued that the court erred in admitting evidence of the uncharged incident of domestic violence because the incident was more inflammatory than the charged offense, was dissimilar to the charged offense, and the admission of the evidence resulted in undue consumption of time. (*Ibid*.) The court held that, because the record reflected the trial court carefully weighed the probative value of the evidence against the risk of prejudice but concluded the conduct was "necessary to give an honest image of why [the plaintiff] would be so scared [under Penal Code section 422]," the

court did not abuse its discretion in admitting evidence of the prior uncharged offenses. (*Id*. at pp. 1145-1146.)

The reasoning employed in *Ogle* applies here. The trial court considered the fact that the past incident would be probative of whether Amaya's fear was reasonable. Because appellant had hit Amaya before, it was reasonable for Amaya to fear that appellant would carry out the violent threats. Accordingly, the trial court properly concluded the prior incident was necessary to give an honest image of why Amaya would be so scared of the threats made by appellant.

Furthermore, the evidence was not unduly prejudicial. Evidence is unduly prejudicial if it is likely to "provoke emotional bias against a party or to cause the jury to prejudge the issues on the basis of extraneous factors." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) Appellant asserts evidence of the prior incident is more inflammatory than the evidence presented about the criminal threats. However, considering that the prior incident of domestic violence involved similar conduct by appellant against the same victim, the evidence was not unduly inflammatory. (*People v. Hoover*, *supra*, 77 Cal.App.4th at p. 1029 [holding that in light of the fact the evidence involved the defendant's history of similar conduct against the same victim, the evidence was not unduly inflammatory].) Further, Amaya's testimony is not unduly inflammatory considering that the defense was allowed to introduce testimony from appellant's daughter where she noted not having seen any marks on Amaya's face despite Amaya's claims that appellant had hit her.[4] Therefore, we find the court did not abuse its discretion in admitting evidence of the prior incident of domestic violence.

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[4] Samantha testified that she entered appellant's room after hearing something fall. When she entered appellant's room and asked what was going on, Amaya responded that appellant had hit her on her face. However, Samantha did not see any marks on Amaya's face and Amaya asked Samantha not to call the police.

II. Sufficiency of The Evidence to Support The Conviction on Three Counts of Making Criminal Threats

A. Standard of Review

To assess a claim of insufficient evidence in a criminal case, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid.*) In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonable have deduced from the evidence. (*Ibid.*) "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid.*)

Further, a single witness's testimony is sufficient to support a conviction, unless it is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Scott* (1978) 21 Cal.3d 284, 296; Evid. Code, § 411.) "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfied the [substantial evidence] standard is sufficient to uphold the finding." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

B. There is Substantial Evidence to Sustain the Conviction on Three Counts of Making Criminal Threats

In order to prove a violation of Penal Code section 422, the prosecution must establish all of the following: "(1) that the defendant 'willfully threaten[ed] to commit a

crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under circumstances in which it [was] made . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; Pen. Code, § 422.)

1. Count 7

Appellant contends that because Amaya was not afraid that appellant would throw her off the bridge and because appellant never attempted to pull Amaya out in order to throw her off the bridge, that appellant's action did not convey a gravity of purpose and that Amaya's fear[5] could not have been reasonable.

In *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340, this court held that the determination about "whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone." This includes "any prior history of

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[5] Appellant contends because Amaya testified that she was not afraid appellant would carry out the threat and throw her off a bridge, that she could not reasonably fear appellant's threat. However, appellant misconstrues the actual testimony rendered. As page 37 of the Reporter's Transcript indicates, when Amaya was asked whether she was "afraid that [appellant] might throw [her] off the freeway" she responded "yes." Additionally, Amaya's fear can be evidenced by her action in locking her door when she observed appellant approaching her side of the van. Furthermore, in light of the fact that appellant had hit Amaya before, it was reasonable for Amaya to fear appellant's threats.

disagreements, or that either [the defendant or the victim] had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1138.) "[I]t is the circumstances under which the threat is made that give meaning to the actual words used." (*People v. Butler* (2000) 85 Cal.App.4th 745, 754.)

Amaya testified that, from the point that she entered appellant's van upon arriving at the airport; the two of them began to argue. While driving on the I-105, appellant stopped on the side of the road by an overpass and said, "Watch, I am going to throw you over this bridge." The words used were unequivocal and unconditional; appellant's action in pulling over made clear that the threat could be carried out because appellant did not premise the threat on a condition. (See *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162.)

Additionally, Amaya testified appellant pulled over by an actual bridge or overpass and she was afraid "he actually might throw [her] off the freeway," demonstrating the specificity of the threat. Further, after pulling over on the side of the freeway, appellant got out of the van and walked to "the corner of the van right by the front passenger door" suggesting the immediacy of the potential action. Based on Amaya's testimony, the jury could reasonably conclude that appellant's threat conveyed a gravity of purpose and an immediate execution of the threat.

As the Supreme Court has emphasized, "the testimony of a single witness that satisfied the [substantial evidence] standard is sufficient to uphold the finding." (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1052.) Such that even when the parties present conflicting testimony—as they do here—reversal is not justified "for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth [or] falsity of the facts upon which a determination depends." (*People v. Maury*, *supra*, 30 Cal.4th at p. 403.) Here, the jury found that based on Amaya's testimony, there was sufficient evidence to conclude appellant's threat conveyed a gravity of purpose and an immediate execution of the threat. We agree.

2. Count 6

As to this count, appellant argues that Amaya's fear was unreasonable because when the statement was made the parties were inside the house, nowhere near a tree, and appellant was not holding rope so as to carry out the threat. Prior to appellant making the threat, the parties had been having an argument about whether appellant could sit on Amaya's pillow. In response, appellant told Amaya "to be quiet . . . otherwise he was going to hang [her] on the tree in the front [of their home]." While appellant did not have rope at the moment he made the threat, appellant did have access to materials he could use to carry out the threat.

Appellant asserts the statement was made during a "silly marital argument" and it was nothing more than "hyperbole." While these actions and words could be characterized as hyperbole or angry utterances, in light of the past incident of domestic violence and previous threats, it was reasonable for the jury to characterize them as more than hyperbole. Further, evidence of appellant's past domestic abuse of Amaya also demonstrates the reasonableness of Amaya's fear. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431 [holding that evidence of past domestic abuse supports finding the victim's fear was reasonable under the circumstances].)

Appellant also alludes to the fact that at the moment the threat was made, he was not holding any rope or any other material that he could have used to hang Amaya from a tree. However, failure to have the materials necessary to carry out the threat does not undercut the actual threat made.

On this record, there is substantial evidence upon which the jury could rely to find appellant's threats did cause Amaya to fear for her life.

3. Count 5

As to this count, the actual words used—"I'm going to beat the shit out of you"—and the fact appellant was holding a Maglite flashlight while making the threat, suggests a sense of specificity and immediacy that conveyed to Amaya the gravity of purpose behind the threat. (See *People v. Stanfield*, *supra*, 32 Cal.App.4th at p. 1162 [finding that the threat was specific because it was directed at the victim and identified not only the

manner in which it would be carried out but confirmed the defendant's possession of the means to accomplish it].) Further, considering the tense circumstances under which the threat was made as well as the past instances in which appellant had threatened Amaya, it was reasonable for the jury to find that the threat was unconditional and unequivocal.

Appellant also asserts the threat that he would "beat the shit" out of Amaya was merely an "angry statement" or an "emotional outburst." However, considering the prior incident of domestic violence and the previous threats made, it was reasonable for the jury to conclude that Amaya's fear was reasonable. (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1052 [holding that the testimony of a single witness that satisfied the substantial evidence standard is sufficient to uphold the jury's finding].)

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**